STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
APCOA/STANDARD PARKING, INC.	:	DETERMINATION DTA NO. 818258
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 1996 through February 28, 1999.	:	

Petitioner, APCOA/Standard Parking, Inc., 900 North Michigan Avenue, Chicago, Illinois 60611, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1996 through February 28, 1999.

A hearing was held before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, 340 East Main Street, Rochester, New York, on January 3, 2001 at 10:30 A.M. and was continued to conclusion on January 4, 2001 at 9:30 A.M. at the same location, with all briefs to be submitted by August 9, 2002, which date began the six-month period for the issuance of this determination. Petitioner appeared by Harris Beach, LLP (Christopher A. DiPasquale, Esq., of counsel). The Division of Taxation appeared by Barbara G. Billet, Esq. (James Della Porta, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation issued the assessment to the proper party.

II. Whether the receipts from the parking facility at the Greater Rochester International Airport are exempt from sales tax pursuant to Tax Law § 1105(c)(6).

III. Whether the receipts from the parking facility at the Greater Rochester International Airport are exempt from sales tax pursuant to Tax Law § 1116(a)(1).

IV. Whether the receipts from the parking facility at the Greater Rochester International Airport are exempt from sales tax pursuant to Public Authorities Law § 2766.

V. Whether petitioner is liable for sales and use taxes on purchases made for use at the parking facility at the Greater Rochester International Airport.

FINDINGS OF FACT

1. On August 23, 1999, the Division of Taxation ("Division") issued a Notice of Determination to APCOA, Inc. ("APCOA")[1] which assessed additional sales and use taxes in the amount of $758,617.21, plus interest in the amount of $97,713.83. The assessment consisted of sales tax due on parking receipts in the amount of $753,161.69 plus tax due on recurring purchases of supplies ($68,194.04) in the amount of $5,455.52. A credit of $393,471.37 was applied to the assessment which resulted from an overpayment of tax from APCOA relating to a parking facility which it operated in Erie County. Accordingly, the balance due on the assessment was reduced to $462,859.67 which included interest due through the date of the issuance of the Notice of Determination.

Previously, in April 1998, October 1998 and April 1999, APCOA and the Division executed consents extending the period of limitation for assessment of sales and use taxes whereby it was agreed that taxes due for the period March 1, 1995 through November 30, 1996 could be assessed at any time on or before December 20, 1999.

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[1] Apparently, the reason for which the title of this proceeding is "APCOA/Standard Parking, Inc." is that a sales tax return filed for the period January 1-31, 1999 was filed in that name. In addition, invoices and a check for payment of the sales tax liability for that period were also in the name "APCOA/Standard Parking, Inc."

2. APCOA is a member of a joint venture called A-M Monroe Parking Company ("A-M"). The other members of the joint venture are MAPCO Auto Parks, Ltd. ("MAPCO"), Sheen & Shine, Inc. ("Sheen & Shine") and Adams Security, Inc. ("Adams"). Sheen & Shine is a janitorial and cleaning supply company while Adams provides security audits and certain security services to the joint venture.

A-M was formed solely to operate the parking facility at the Greater Rochester International Airport ("GRIA"). APCOA is the largest parking company in the world in terms of vehicles parked and revenues collected. MAPCO, a parking services management company formed in 1970, has its expertise in the local market, i.e., at other airports and urban locations throughout New York State. APCOA and MAPCO were involved in other joint ventures at Elmira Airport (A-M Elmira Parking Company) and at the White Plains-Westchester Airport (A-M Westchester Parking Company).

While there is a written agreement setting forth the terms of the joint venture, it was not made a part of the record. Pursuant to the agreement, losses were shared in the same proportion as the profits, with percentages set forth in the agreement. In various documents, A-M has been described as a joint venture partnership. APCOA has a valid certificate of authority with the State of New York and it has filed sales tax returns on behalf of A-M; MAPCO did not file any returns on behalf of A-M.

3. At the hearing, the following facts were stipulated to by the parties herein:

a. A-M has not applied for a Certificate of Registration with the New York State Department of Taxation and Finance;

b. A-M has not filed any sales tax returns with the State of New York;

c. A-M does not have on file with the Monroe County Clerk's Office a certificate for doing business under an assumed name, i.e., a "d/b/a certificate";

d. While MAPCO and APCOA did not file a separate d/b/a certificate for each of the joint ventures entered into between the entities, such a certificate was filed during the1970s when the entities first entered into a joint venture known then as A-M Parking Company.

4. In January 1982, A-M began operating the parking facilities at what was then known as the Rochester-Monroe County Airport (now GRIA). A-M had submitted a bid for the job in September 1981 and, after being awarded the job, it began operating the parking facilities in January 1982. At that time, the airport was owned and operated by Monroe County. A-M operated under a "concession agreement" whereby it guaranteed the County a certain amount of money ($1,000,000.00) and was then able to run its own operation, i.e., it decided how many booths would be open, how many employees would staff the booths, how many snow plows would remove snow from the facilities, etc. All expenses were borne by A-M. The only restriction placed upon A-M by the County was that there could be no more than a 15-second wait per transaction.

Between 1987 and 1991, the airport underwent major reconstruction (the terminal was demolished and a new one was built, connectors were built as were a ramp garage and outside parking facilities). In 1991, the County issued a Request for Proposal ("RFP") and in September 1991, A-M entered into a management contract with the Monroe County Airport Authority ("MCAA") to operate the public parking facilities at GRIA. Pursuant to the RFP and this contract, the original arrangement with A-M changed substantially, i.e., A-M now received a management fee and MCAA received the balance of the receipts from the parking facilities.

The 1991 management contract provided that A-M would receive, as its management fee, 5.38 percent of the net revenue of the parking facility (the contract defined "net revenue" as the gross revenue less the operator reimbursable expenses and the MCAA reimbursable expenses). There were two subsequent amendments to this management contract, to wit, the first amendment was executed on June 29, 1993 and the second on January 1, 1995. The first amendment changed A-M's management fee to a fixed amount ($10,860.00 per month through December 31, 1993 and $10,340.00 per month for the year 1994) plus a certain percentage of monthly revenues in excess of variable amounts as set forth in the contract. The second amendment extended the management contract for an additional three years (January 1, 1995 through December 31, 1997) and provided that A-M's management fee would be $10,340.00 per month plus 4.7 percent of monthly gross revenues in excess of $220,000.00 per month.

Despite the fact that the second amendment extended the management contract through December 31, 1997, MCAA and A-M (which was described in the contract as a joint venture consisting of APCOA, MAPCO, Sheen & Shine and Adams) entered into a new management contract on January 1, 1996. In the contract, which was in effect during the period at issue herein, A-M was identified as the "operator." In addition, unlike the 1991 contract and the two amendments thereto, A-M was now described as a "joint venture partnership." Section 1 of the contract provided that "the public parking facilities located at the Airport shall be managed and operated by the Operator." The contract acknowledged that MCAA had the right to contract for an operator of the parking facility at GRIA, that MCAA wished to expand the airport public parking facility and operation to include a shuttle lot and that A-M "has the specialized skills and experience to provide the additional management, equipment and services for operating the expanded public parking facilities." While decisions by MCAA to eliminate or reduce parking

fees are binding upon A-M, the amount of the management fee, as provided in the contract, is still due and owing to A-M. As set forth in the contract, one of the reasons for entering into a new contract was that MCAA wished to expand the airport parking facility and operation to include a surface shuttle parking lot.

5. Relevant provisions of the 1996 management contract include the following:

a. Within 15 days of the execution of the contract, and thereafter by July 1 of each year, A-M is required to submit a proposed annual operating budget. The final annual operating budget was subject to approval by MCAA (section 4[A]);

b. A-M is to pay all costs and expenses connected with the operation of the parking facility when due except approved expense items to be paid by MCAA (including but not limited to utilities) and A-M was to be reimbursed monthly by MCAA from gross revenues (section 4[E][1]);

c. As its management fee for "operating and managing" the parking facility, A-M is to receive the sum of $17,145.00 (the "fixed fee") plus 4.7 percent of the monthly gross revenues in excess of $220,000.00 (the "bonus fee"). The bonus fee was capped, for any month, at $17,145.00 (section 5[A]);

d. A-M is to pay over to MCAA an amount equal to 50 percent of the current month's gross revenues on or before the 25th day of each month, and on or before the 15th day of the following month, A-M is to pay over to MCAA a check for the balance due for that month. This amount, referred to as "Authority Revenue," is defined as Gross Revenues - (Management Fee + Operator Reimbursable Expenses) + Shuttle Lot Revenue Control System Rent + Authority Reimbursable Expenses - Initial Payment (section 5[B][1]and [2]);

e. A-M is to provide, at its expense, to be used solely to operate the parking facility, the following: one sweeper; two 3/4 ton pickup trucks equipped with salter, sanders and rubber plow blades; one safe for each exit plaza complex; an electronic credit card acceptance system and electronic personal check verification and guarantee system for each exit plaza; radios; office equipment; five shuttle buses for the shuttle lot; and all other transportation and communication equipment necessary to operate the parking facility (section 7);

f. A-M is to provide all labor, equipment, materials, licenses, permits and personnel necessary for maintenance, repair and cleaning and when service required under the contract was to be carried out pursuant to a service contract, the contract (with a subcontractor) is to be executed with a company approved by MCAA (section 8[D][1]and [2]);

g. At the end of each day, parking receipts or Gross Revenues are to be deposited into A-M's account, this account to be used solely for A-M's operation of the parking facility and not comingled with funds from other operations of A-M (section 9[B]);

h. A-M is to staff the parking facility and is to provide proper training thereof. MCAA reserved the right to reject or require discharge of any employee of A-M if that employee's behavior or attitude failed to meet the contract's standards. A-M must provide uniforms subject to approval by MCAA. A-M must provide a resident manager and assistant manager to oversee the operations (section10[A] through [E]);

i. All claims against A-M for personal injury or property damage must be sent to its insurance carrier within 24 hours (section 11[A]);

j. A-M bears any and all loss or casualty sustained by it from its operation of the parking facility and, unless caused by the gross negligence or wilful misconduct of MCAA or the County, A-M is required to indemnify and hold harmless MCAA and the County from any and all claims, suits, causes of action, etc, arising out of any acts or omissions on the part of A-M, its officers, employees, contractors, agents or invitees (section 22);

k. A-M must carry comprehensive public liability insurance of not less than $5,000,000.00 single limit of liability (section 23[A]) as well as automobile liability insurance for all owned as well as nonowned and hired vehicles (section 23 [B]);

l. The contract provided that it was the intention of the parties "that the only relationship hereunder is solely that of owner (the Authority and County), and Operator." The contract further stated that the Operator was to manage the parking facilities "under the terms, conditions, rules and regulations designated by the Authority and as set forth in this Agreement"(section 36).

6. Section 12 of the management contract, relating to taxes and fees, provides as follows:[2]

> Operator shall promptly pay, when due, all sales taxes (including those for parking), retail sales and use taxes, consumer taxes, permit fees, license fees and/or other taxes or fees which may be assigned, charged or levied against it when said taxes or fees are due and payable with respect to Operator's operations at the Parking Facility.
>
> In connection with the collection of sales taxes, the Authority had directed Operator, effective March 1, 1997, not to charge, collect or remit New York sales tax for the parking operations at the Airport, by virtue of Section 225 of Chapter 309 of the Laws of 1996 amending Section 1105(c)(6) of the New York State Tax Law. Until Authority directs otherwise, Operator shall comply with such directive, and the Authority shall defend, indemnify and hold harmless Operator, each of Operator's Partners, and their respective shareholders, partners, officers, directors and employees, of and from any and all claims, suits, proceedings, actions,

[2] References to "Operator" and "Authority" referred to A-M and MCAA, respectively.

> causes of action, responsibility, demands, judgments, executions or losses, including reasonable attorneys fees, which it shall suffer or which shall be made against them on account of any liability for failure to charge, collect or remit such sales taxes in accordance with the Authority's directive.

7. The decision by MCAA to advise A-M not to collect or remit sales tax resulted from the attendance, by Philip H. Mancini, Assistant Treasurer and Fiscal Coordinator of MCAA, at a regional seminar of the Government Finance Officer's Association at which he was advised, by an attorney from the New York State Department of Taxation and Finance, that owner-operated parking facilities were no longer required to collect or remit sales tax. Mr. Mancini obtained a copy of the legislation which amended Tax Law § 1105(c)(6), effective December 1, 1996, and provided it to the Monroe County Law Department which reviewed the legislation. It was decided that, in the opinion of Mr. Mancini and the Law Department, GRIA was owned and operated by a municipal entity and should, therefore, not collect and remit tax. Mr. Mancini then drafted a letter for the signature of the treasurer of MCAA to be sent to APCOA directing it to stop collecting tax on the parking receipts. Since the receipts for February 1997 were due to be remitted on March 15, 1997, APCOA interpreted the letter to mean that taxes for February 1997 should not be remitted since the effective date of the legislation was December 1996. Per the audit report, it was determined that the parking receipts from GRIA for the month of February 1997 totaled $300,655.00. Tax at the rate of 8 percent would, if it was determined that such receipts were taxable or, even if found not to be subject to tax but, nevertheless, due and owing because tax was collected (but not remitted) thereon, be in the sum of $24,052.40. Upon audit, it was determined that APCOA did collect, report and remit sales tax on parking receipts from GRIA through January 1997.

8. Gerald J. Mecca, MCAA's Treasurer, prepared a letter on May 28, 1997 which was addressed to "TO WHOM IT MAY CONCERN" and stated as follows:

> Please be advised that the Monroe County Airport Authority is a duly incorporated authority of the state of New York and, as such, is exempt from state or local sales tax. Any purchases made on our behalf by A-M Monroe Parking Company for our parking facility at the Greater Rochester International Airport, 1200 Brooks Avenue, Rochester, New York 14624 are exempt from sales tax and our identification/exemption number is . . . .

Mr. Mecca notified APCOA, by letter dated July 21, 1997, that:

> By virtue of Section 225 of Chapter 309 of the Laws of 1996 amending § 1105(c)(6) of the New York State Tax Law to exclude from sales tax receipts from the sale of parking services at parking facilities owned and operated by a public corporation, and Title 31 of the Public Authorities Law creating Monroe County Airport Authority, the Monroe County Airport Authority had been exempted from collecting New York State sales tax from the Airport Parking Facility.
>
> Effective March 1, 1997 A-M Parking Company should not charge, collect or remit New York State sales tax for the Monroe County Airport Authority parking operation at the Greater Rochester International Airport.

9. Richard Goldstein of MAPCO (Mr. Goldstein and his brother, Leslie, are the sole shareholders of MAPCO), one of the companies which comprised the joint venture "A-M," appeared at the hearing and testified as to A-M's operation of the parking facilities at GRIA. In the January 1, 1996 management contract, the acknowledgments to the signatures of Mr. Goldstein, on behalf of MAPCO, and of James V. LaRocco, Executive Vice President of Corporate Development for APCOA, indicate that both corporations are general partners of A-M. During the period at issue, MAPCO received a form K-1 (Partner's Share of Income, Credits, Deductions, Etc.) from APCOA. The items which make up the expenses for operating the parking facilities are procured by A-M and are then vouchered by A-M to MCAA. Examples of these expenses include labor, salt, shovels and supplies. While many of the expenses are borne by MCAA (through vouchering by A-M), some expenses are provided by A-M pursuant to the management contract. Such expenses include gas and oil for snow plows, lawn mowers and

certain other equipment which MAPCO already had purchased for use in its other ventures. The providing of this equipment and acceptance of these expenses were built into A-M's bid for the contract as an inducement to award it the contract.

10. In April 2000, MAPCO entered into a contract with Passero Associates, P.C. ("Passero") under which Passero was to provide professional engineering advice, consultation and services relating to the design of an overflow parking lot and adjacent lots at GRIA. In the contract, the "OWNER" was listed as MAPCO Auto Parks, Ltd. and the contract was signed, for the OWNER, by Richard Goldstein. The OWNER was obligated to pay Passero for all services and related costs. While Mr. Goldstein stated that MAPCO was reimbursed for all payments made to Passero pursuant to this contract, nowhere in the contract is MCAA or Monroe County mentioned in any manner.

Contracts for snow removal at GRIA's parking facilities were signed by Mr. Goldstein; MCAA did not sign them. These contracts (the first was with Mr. Tow, the second with Villager Construction) did not indicate thereon that A-M was the agent for MCAA or that MCAA was liable for payment. Mr. Goldstein would not, however, sign a contract with a vendor without asking the permission of MCAA; often, MCAA would tell him which vendor to use.

With respect to purchase orders, most orders were made verbally by Mr. Goldstein. Whenever a written contract was required, the contract did not state thereon that A-M was the agent for MCAA. Bills from vendors were sent to A-M's Rochester office to be vouchered and were then sent to APCOA's Cleveland, Ohio office for payment. Checks for payment were issued by APCOA on behalf of A-M.

11. For expenses for which there was no reimbursement from MCAA, such as the purchase of trucks used at the parking facilities, A-M paid sales tax upon these purchases.

12. Where credit cards or checks were used to pay for parking at GRIA, payment was made to A-M. The bank account to which all parking fees were deposited was maintained by A-M; MCAA had no access to this account.

The books of A-M were managed by APCOA. Employees at the GRIA parking facilities were employees of A-M and received their paychecks from A-M. Their uniforms indicated that they were employees of A-M. Other than a Monroe County ID, there was no indication to the public that these employees were anything other than employees of A-M. A-M has a training program for the employees utilizing manuals, videos and training guides which are not formally approved by MCAA. Joseph Frescottie, A-M's airport parking manager, hires and fires the employees. The Standard Operating Procedure ("SOP") was developed by A-M (it was originally derived from the SOP of APCOA) and was then presented to MCAA for approval.

13.Tickets for parking fees issued to the public at GRIA have only the name "A-M" on them.

14. MCAA has no employees. Monroe County provides the staffing of the airport for the benefit of MCAA. Pursuant to the lease agreement for GRIA entered into between Monroe County and MCAA on September 15, 1989, Monroe County, which was the owner and operator of GRIA, leased the airport to MCAA and MCAA hired Monroe County to operate it. Monroe County provides operational personnel to run the airport and, in return, it is fully reimbursed by MCAA for its expenses. All revenues derived from the airport belong to MCAA. Pursuant to the 1989 lease agreement between MCAA and Monroe County, MCAA was given "the right to contract for an operator of the parking facility at the Airport." MCAA contracted with A-M to operate this parking facility (***see***, Finding of Fact "4").

MCAA was created to issue revenue bonds because Monroe County could not. The revenue bonds' main source of payment is the revenue generated by the airport. Airport revenue is derived from billings to the various airlines, parking revenue, car rental revenue and certain other sources. If there is a shortfall, it is not charged to Monroe County which is entitled to full reimbursement for all airport expenditures. To compensate for a shortfall, MCAA would increase fees charged to the airlines.

15. MCAA reviews the budget submitted by A-M and reviews specific expenses to ascertain if there are areas thereof which should be increased or decreased. When GRIA began to face competition with private companies relative to shuttle parking lots, the Director of Aviation, Terry Slaybaugh (a Monroe County employee who is the chief operating officer of GRIA) made the decision to reduce the price charged for parking in GRIA's shuttle lot.

16. James A. Fumia is the Deputy Director of Aviation at GRIA. He is employed by Monroe County and is involved in the day-to-day operations of the entire airport, including all personnel matters, negotiations, contracts and real estate matters. He meets annually with A-M to establish goals, review budget matters, set overall policies and also meets with A-M (with Richard Goldstein) once per month to review different issues which may have arisen.

MCAA, through Mr. Fumia, frequently provides direction to A-M. An example is during special events when parking fees are discounted or waived entirely. In such circumstances, MCAA makes this decision and A-M has no say in the matter; however, A-M still gets its management fee in any case.

During the process of preparing the budget, A-M can recommend changes such as the making of capital improvements requiring the appropriation of moneys. A-M cannot, however, make changes to the parking rates charged to the public or undertake capital improvements on its

own without MCAA approval. The parking facility budget is approved by Terry Slaybaugh, Director of Aviation, on behalf of Monroe County.

When A-M makes purchases for the parking facilities at GRIA, some of the payments are made directly to the vendor by A-M and others are vouchered to Monroe County. When paid by A-M, expenses reduce the revenues which are paid by A-M to MCAA.

For capital improvement projects, there are contracts entered into by MCAA or Monroe County and these contracts are paid through MCAA or Monroe County's capital fund. When there is a complaint concerning an employee of A-M which is directed to MCAA's administrative offices, MCAA will direct A-M on the policy to be followed. MCAA can and will direct that such an employee be terminated.

Upon cross examination, Mr. Fumia admitted that he did not know the number of employees at GRIA or the hours of their shifts at the parking facilities.

CONCLUSIONS OF LAW

A. The first issue which must be addressed is whether the assessment was issued by the Division to the proper party. Petitioner contends that the proper party was A-M which operated the parking facility and that issuance of the notice to APCOA was improper since APCOA was merely one of four members of the joint venture constituting A-M.

The Division contends that A-M is a partnership and, as such, pursuant to Tax Law § 1131(1), the definition of "persons required to collect tax" specifically includes "any member of a partnership."

While the term "joint venture" is not defined in Articles 28 or 29 of the Tax Law, it is defined as:

> [a] legal entity in the nature of a partnership engaged in the joint prosecution of a particular transaction for mutual profit.

* * *

> A one-time grouping of two or more persons in a business venture. Unlike a partnership, a joint venture does not entail a continuing relationship among the parties. A joint venture is treated like a partnership for Federal income tax purposes (Black's Law Dictionary 753[5th ed 1979]).

As previously noted, A-M was described in various documents in this record (most notably, the January 1, 1996 management contract which was in effect during the period at issue herein) as a joint venture partnership. The corporate officers of MAPCO and APCOA each signed this contract as general partners of A-M. Richard Goldstein of MAPCO acknowledged that his company received a form K-1 (Partner's Share of Income, Credits, Deductions, Etc.) from APCOA.

As noted by the Court in ***Great Lakes-Dunbar-Rochester v. State Tax Commn.*** (102 AD2d 1, 477 NYS2d 461, 463):

> Respondent correctly determined that a joint venture is a 'person' as defined by subdivision (a) of section 1101 of the Tax Law. Although the section does not specifically refer to joint ventures, it does define a partnership as a person within the meaning of the article. Generally speaking, a joint venture is a partnership organized for a limited time and purpose (16 NYJur 2d, Business Relationships, § 1578, pp. 254-255; ***Dogan v. Harbert Constr. Corp.***, 507 F Supp 254, 258).

Since APCOA was a partner in the joint venture known as A-M Monroe Parking Company and, in addition, since APCOA has a valid certificate of authority with the State of New York and has filed the sales tax returns on behalf of A-M, it is hereby determined that issuance of the Notice of Determination by the Division to APCOA was proper in that APCOA was a person required to collect tax on behalf of A-M.

B. Tax Law § 1105(c)(6) provides that there shall be paid a tax upon the receipts from every sale, except for resale, of the following services:

> Providing parking, garaging or storing of motor vehicles by persons operating a garage (other than a garage which is part of premises occupied solely as a private one or two family dwelling), parking lot or other place of business engaged in providing parking, garaging or storing of motor vehicles provided, however, this paragraph shall not apply to such facilities owned and operated by a public corporation, as defined by section sixty-six of the general construction law, . . . , or any agency or instrumentality of a municipal corporation or district corporation as defined by such section sixty-six.

As correctly noted by petitioner in its Hearing Memorandum, section 66 of the General Construction Law defines a "public corporation" as including a "municipal corporation." The term "municipal corporation" specifically includes a county (General Construction Law § 66[2]). The term "public benefit corporation" is defined as "a corporation organized to construct or operate a public improvement wholly or partly within the state, the profits from which inure to the benefit of this or other states, or to the people thereof" (General Construction Law § 66[3]).

Petitioner contends that since MCAA controls the business decisions relative to the parking facilities and bears all gains and losses resulting therefrom, the economic reality is that MCAA, not A-M, owns and operates such facilities. In furtherance of its position, petitioner maintains that A-M is an agent of MCAA and, as such, it argues that the exemption from sales tax as provided in Tax Law § 1105(c)(6) is applicable to the parking receipts. The Division, in response, argues that while MCAA is a public authority, it is A-M rather than MCAA (or Monroe County) which is operating the parking facilities at GRIA, and accordingly, this exemption is not applicable. The Division contends that pursuant to the terms of the management contract, A-M is not the agent of MCAA. While MCAA is a public authority, it is A-M rather than MCAA (or Monroe County) which is operating the parking facilities at GRIA and, accordingly, A-M is not entitled to this exemption.

It is not in dispute that Monroe County owned GRIA (including the parking facilities) and pursuant to the 1989 agreement, agreed to lease the parking facilities to MCAA which, in turn, hired Monroe County to operate them. To determine whether petitioner is entitled to the exemption provided by Tax Law § 1105(c)(6), it must, therefore, be determined whether the County (the municipal corporation) or MCAA (the public benefit corporation) was the operator of the parking facilities as well.

C. Petitioner, in its Hearing Memorandum and later in a letter submitted in lieu of a brief, contends that a determination of who was the operator of the parking facilities should not be dependent upon a finding that A-M was an agent of MCAA but, instead, should hinge upon the "economic realities" of the situation, i.e., who bears the burden and who gets the benefits of the parking facilities. The Division maintains that the management contract specifically designates A-M as the operator of the parking facilities and does not expressly state that A-M was to be the agent of MCAA.

With respect to the issue of whether A-M was the agent of MCAA, the Tax Appeals Tribunal, in ***Matter of MGK Constructors*** (Tax Appeals Tribunal, March 5, 1992) stated:

> 'To establish an agency or representative relationship there must be a manifestation that petitioners consented to act on behalf of their clients, subject to the latter's control and that the clients authorized this fiduciary relationship' (***Matter of Hooper Holmes, Inc. v Wetzler***, 152 AD22d 871, 544 NYS2d 233, 235, ***lv denied*** 75 NY2d 706, 552 NYS2d 929).

The Tribunal, in deciding whether the petitioner was acting as an agent for the City of New York in procuring guard services, first examined the contract between petitioner and the provider of the guard services and found: (1) that there was no express clause in the contract which stated that petitioner and the City considered their relationship to be one of agency; (2) that the contract did not vest the City with the level of control over the performance of

petitioner's work such that an agency relationship was indicated; (3) that the terms of the contract contradicted the existence of an agency relationship (among which were that petitioner was allowed to use its own methods in meeting contractual obligations such that a sufficient level of control by the City was not demonstrated, that petitioner was responsible for any injury, defacement or theft of the City's property regardless of whether or not it was the fault of petitioner and that petitioner was not reimbursed for the retention of a supervising security guard since it was considered overhead by the contract); and (4) there was no evidence that petitioner held itself out as an agent for the City when procuring the guard service (it did not use governmental purchase orders or exemption documents) or that the guard service, by virtue of bills or other documents, considered petitioner to be the purchaser on behalf of the City (***Matter of MGK Constructors, supra***).

An examination of the record herein results in a conclusion that an agency relationship did not exist between A-M and MCAA. This conclusion is based upon the following indicia:

a. The management contract entered into between the parties on January 1, 1996, and applicable for the period at issue herein, specifically states that it was the intention of the parties "that the only relationship hereunder is solely that of owner (the Authority and County) and Operator" (section 36). Nowhere in the contract was it stated that A-M was to act as agent for the County or MCAA;

b. A-M was to provide, at its own expense and as a part of the contract, certain equipment and vehicles as well as a resident manager and assistant manager (sections 7 and 10[A] through [E]);

c. A-M bore any and all loss or casualty sustained by it from operation of the parking facilities and was required to indemnify and hold harmless MCAA and the County from

any and all claims, suits, etc. arising out of any acts or omissions on the part of A-M, its officers, employees, contractors, agents or invitees (section 22);

d. Nowhere in the record is there any evidence that A-M indicated to any of its subcontractors or suppliers that it was acting as agent for MCAA nor is there any evidence from such subcontractors or suppliers that they understood or were made aware that they were transacting business with A-M as agent for MCAA;

e. All receipts from the parking facilities were deposited into an account maintained by A-M; neither the County nor MCAA had any access to or control over this account;

Based upon the foregoing, it cannot be found that an agency relationship was created by the contract entered into between MCAA and A-M; moreover, there is no indication that A-M held itself out as the agent of MCAA or that third parties, i.e., subcontractors or suppliers, were informed of such a relationship or that they otherwise believed in its existence.

Furthermore, it is clear from the terms of the contract that A-M was at all times the *operator* of the parking facility. The management contract provides that, pursuant to the lease agreement between MCAA and the County, MCAA has the authority to contract for an operator of the parking facility at the airport and, by virtue of such management contract, that is precisely what MCAA did. It hired an operator with "the specialized skills and experience" necessary to operate the expanded public parking facilities at the airport. While certainly MCAA retained the right to specify certain terms, conditions, rules and regulations under which A-M was to operate, MCAA was not the operator nor was it the principal in an agency relationship with A-M. Accordingly, by virtue of the fact that the public corporation owned but did not operate the parking facility at GRIA, the exemption from sales tax as provided in Tax Law § 1105(c)(6) is inapplicable herein.

D. Tax Law § 1116(a)(1) provides as follows:

> Except as otherwise provided in this section, any sale or amusement charge by or to any of the following . . . shall not be subject to the sales and compensating use taxes imposed under this article:
>
> (1) The State of New York, or any of its agencies, instrumentalities, public corporations . . . or political subdivisions where it is the purchaser, user or consumer, or where it is a vendor of services or property of a kind not ordinarily sold by private persons;

20 NYCRR 529.2(a)(1) includes within "governmental entities," the term "agencies and instrumentalities of the State" which is defined as "any authority, commission or independent board created by the Legislature for a public purpose." Title 31 of Article 8 of the Public Authorities Law, the "Monroe County Airport Authority Act," was added by chapter 663 of the Laws of 1989, and accordingly, MCAA is such a governmental entity.

20 NYCRR 529.2(c)(2) states that "[s]ales by New York State governmental entities of tangible personal property or services of a kind which are ordinarily sold by private persons . . . are subject to the sales and use tax." Examples, set forth in this regulation, of such services which are subject to tax include sale of surplus vehicles at auction, snow removal, sale of electricity and operation of a hotel or restaurant.

Petitioner contends that because GRIA is publicly owned and, as such, because its on-site parking services cannot be sold by private persons, this exemption from sales tax is applicable to the receipts from parking at the airport. While it may be true that private entities cannot sell on-site parking services at GRIA, various private entities do operate shuttle lots in close proximity to the airport (***see***, Finding of Fact "15") which are in direct competition with the on-site facilities. Furthermore, the statute makes it clear that it is the *kind* of service which dictates whether it falls within this exemption. To be entitled to the exemption, the service must be of a kind which is not *ordinarily* sold by private persons. Without a doubt, parking services are

commonly sold by private persons at numerous parking lots and garages throughout the State. Therefore, it cannot be found that the parking services at GRIA are services "of a kind not ordinarily sold by private persons."

Moreover, as noted by the Division, there is a specific sales tax exemption for parking services at facilities which are owned and operated by a public corporation or an instrumentality of a municipal corporation (Tax Law § 1105[c][6]). Accordingly, it would be illogical to infer from the language in Tax Law § 1116(a)(1) that it was the intent of the Legislature to exempt the sale of parking services by a public corporation or instrumentality of the State in another statute within the same article of the Tax Law. Therefore, it must be determined that the parking receipts at issue herein are not exempt from sales or use taxes pursuant to Tax Law § 1116(a)(1).

E. Title 31 of the Public Authorities Law, effective July 21, 1989, established MCAA. Public Authorities Law § 2766, which is a part of Title 31, provides, in relevant part, as follows:

> 1. The authority [MCAA] shall not be required to pay any fees, taxes, special ad valorem levies or assessments, whether state or local, including but not limited to fees, taxes, special ad valorem levies or assessments on real property, franchise taxes, sales taxes or other excise taxes, upon any property owned by it or under its jurisdiction, control or supervision, or upon the uses thereof, or upon its activities in the operation and maintenance of its facilities or any fares, tolls, rentals, rates, charges, fees, revenues or other income received by the authority. . . . The construction, use, occupation or possession of any property owned by the authority or the county, including improvements thereon, by any person or public corporation under a lease, lease and sublease or any other agreement shall not operate to abrogate or limit the foregoing exemption, notwithstanding that the lessee, user, occupant or person in possession shall claim ownership for federal income tax purposes.

In their briefs, the parties discuss whether this exemption applies just to MCAA or to A-M as well. Petitioner contends that the parking revenues collected by A-M and turned over to MCAA constitute "revenues or income received by the Authority" and, as such, are entitled to

the exemption. The Division, on the other hand, maintains that since A-M collected the parking revenues and paid to MCAA just the "authority revenue" which, as defined in the management contract is gross revenue minus the management fee due A-M and certain other expenses incurred by A-M, the actual parking receipts were not "received by the Authority" and, therefore, this exemption does not apply herein.

A careful reading of Public Authorities Law § 2766 reveals that, for reasons not set forth by either party, the exemption is inapplicable to the parking receipts at issue in this proceeding. Unlike the exemption from sales tax in Tax Law § 1116(a)(1), previously addressed, which exempted from tax "any sale or amusement charge by or to" the instrumentality, public corporation, etc., Public Authorities Law § 2766 states that MCAA "shall not be required to pay any fees, taxes . . . ." There is a significant difference in the exemptions created by these statutes.

While Tax Law § 1116(a)(1) exempts sales made "by or to" the governmental entity, Public Authorities Law § 2766, by stating that MCAA "shall not be required to pay" quite clearly exempts sales made *to, but not by,* MCAA. It is well settled that the sales tax is imposed on receipts from retail sales of tangible personal property and certain specifically enumerated services. The sales tax on the receipts from the parking facilities at GRIA was not imposed upon MCAA, Monroe County, A-M, APCOA or any of the other partners in the A-M joint venture; the taxes were imposed upon the receipts from the sale of the parking services and, unless specifically exempted from tax, were to be collected by the vendor of the services, as trustee for the State of New York (***see***, Tax Law § 1132[a]). Accordingly, it is hereby determined that the exemption provided in Public Authorities Law § 2766 applies only to taxes which MCAA would otherwise be required to pay and, since MCAA was merely required to collect the sales tax on

parking receipts at GRIA from those to whom parking services were provided, this exemption is inapplicable herein.

F. As previously noted (***see***, Finding of Fact "1"), part of the assessment against petitioner consists of tax imposed on recurring purchases of supplies which were consumed in performing the contract entered into between A-M and MCAA, totaling $68,194.04, which resulted in assessment of tax in the sum of $5,455.52.

The Division, in its brief, acknowledges that purchases made by governmental entities are exempt from sales tax. It contends, however, that purchases made by government contractors, i.e., entities which sell goods or services to the government, are subject to tax unless the contractor has been designated by the government as its agent for purposes of making such purchases. The Division then states that because petitioner was not the agent of MCAA, its purchases are subject to tax. Since it has heretofore been determined that A-M, a joint venture in which petitioner was a partner, was not the agent of MCAA, it would reasonably follow that all purchases made by A-M would be subject to sales and use tax.

However, as noted in Conclusion of Law "E", Public Authorities Law § 2766 provides that MCAA shall not be required to pay any taxes (including sales taxes) "upon any property owned by it or under its jurisdiction, control or supervision, or upon the uses thereof, or upon its activities in the operation and maintenance of its facilities." Moreover, the statute goes on to state that use or possession of any property owned by MCAA or Monroe County, by any person under a lease or any other agreement "shall not operate to abrogate or limit this exemption" even if the user or person in possession shall claim ownership of this property for income tax purposes.

Despite the fact that A-M was determined not to have been acting as the agent for MCAA, it is readily apparent from the record that MCAA exercised control over the operation of the parking facilities at GRIA. While A-M did, in fact, operate the facilities pursuant to the management contract, it is clear from the terms of the contract and from the testimony of Richard Goldstein of MAPCO that A-M was required to adhere to guidelines, directives and instructions from MCAA regarding its operation of the GRIA parking facilities. Accordingly, purchases made by A-M for use in fulfilling the terms of the management contract to operate the GRIA parking facilities for MCAA were made for property which was under the jurisdiction, control or supervision of MCAA for activities in operation or maintenance of MCAA's facilities (at GRIA) and even though used or possessed by A-M, are exempt from the imposition of tax pursuant to Public Authorities Law § 2766. Therefore, that portion of the assessment which assessed tax on purchases in the amount of $5,455.52 must be canceled.

G. The petition of APCOA/Standard Parking, Inc. is granted to the extent indicated in Conclusion of Law "F"; the Division of Taxation is hereby directed to modify the Notice of Determination issued on August 23 ,1999 accordingly; and, except as so granted, the petition is in all other respects denied.

DATED: Troy, New York
January 16, 2003

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE